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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: JUSTICE SHIRLEY WERNER KORNREICH PART 54

Justice

Index Number : 118318/2009

MATIAS, MARY

VS.

MERCK SHARP & DOHME

SEQUENCE NUMBER : 001

DISMISS

INDEX NO. _____

MOTION DATE _____

MOTION SEQ. NO. _____

MOTION CAL. NO. _____

this motion to/for _____

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	1, 2, 3
Answering Affidavits — Exhibits	4, 5, 6, 7
Replying Affidavits	8

Cross-Motion: ☐ Yes ☐ No

Upon the foregoing papers, It is ordered that this motion is decided in accordance to the annexed decision and order.

FILED

NOV 15 2010

NEW YORK
COUNTY CLERK'S OFFICE

Dated: 11/10/10

JUSTICE SHIRLEY WERNER KORNREICH

J.S.C.

Check one: ☒ FINAL DISPOSITION ☐ NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST ☐ REFERENCE

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 54

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MARY MATIAS, ELIZABETH BATES, ANDREA GOLUB, BARBARA JAROS, ENID HERBERT as Administratrix of the Estate of BARBARA L. LUPOLE,

Index No.:118318/2009

Plaintiffs,

DECISION AND ORDER

-against-

MERCK SHARP & DOHME CORP. F/K/A MERCK & CO., INC., HUGHES HUBBARD & REED LLP, M. ELAINE HORN, VILIA B. HAYES, and JOHN AND JANE DOES Whose Identity Cannot Be Ascertained at the Present Time,

Defendants.

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KORNREICH, SHIRLEY WERNER, J.:

Pending before the court are three motions by defendants seeking to dismiss the complaint. The complaint alleges fraud in the preparation and filing of stipulations on behalf of plaintiffs Mary Matias, Elizabeth Bates, Andrea Golub, Barbara Jaros, Enid Herbert as Administratrix of the Estate of Hilda Peltz and Deborah Martin as Administratrix of the Estate of Barbara L. Lupole (collectively plaintiffs), which stipulations dismissed these New York plaintiffs' claims in collateral mass tort litigations. The dismissal motions have been filed by, respectively, defendants Hughes Hubbard & Reed LLP (HHR) and HHR attorney Vilia B. Hayes (collectively HHR defendants) (seq. #1), defendant Merck & Co., Inc., now known as Merck Sharp & Dohme Corp. (Merck) (seq. #2), and defendants Williams & Connolly LLP (W&C) and W&C attorney M. Elaine Horn (collectively W&C defendants) (seq. #3). The court considers the motions jointly for disposition.

All of the defendants argue that plaintiffs should have moved to vacate the settlements and that the complaint constitutes an impermissible collateral attack on the settlement. Merck

and W&C further contend that plaintiffs have failed to sufficiently plead their fraud claims. The HHR defendants argue that documentary evidence is dispositive of the issues and requires dismissal. CPLR 3211(a)(1).

Background

The Underlying Mass Tort Litigation

Plaintiffs here were plaintiffs in the New York Bextra and Celebrex Product Liability Litigation, a Coordinated Proceeding to which this court was assigned by the New York Coordination Litigation Panel (Bextra/Celebrex litigation). The Bextra/Celebrex litigation arose out of injuries allegedly sustained as a result of ingesting Bextra and/or Celebrex, drugs manufactured by Pfizer, Inc. and other named pharmaceutical companies (collectively Pfizer). The proceeding in New York, which encompassed all New York State products liability cases involving Bextra and Celebrex, was coordinated with the federal proceeding coordinating all such cases filed in the federal courts (the MDL). Plaintiffs also alleged that they sustained their injuries as a result of ingesting Vioxx, a drug manufactured and marketed by Merck.[1]

A Vioxx settlement agreement was achieved in November 2007. *See In re Vioxx Prods. Liab. Litig.*, 2010 US Dist. LEXIS 24275 *6.[2] The court takes judicial notice of the settlement

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[1] The federal multi-district litigation for Bextra/Celebrex was coordinated by Judge Charles R. Breyer in the Northern District of California, *In re Bextra and Celebrex Marketing Sales Practice and Product Liability Litigation*. The federal Vioxx cases were coordinated, separately, by Judge Eldon E. Fallon in the Eastern District of Louisiana, *In re Vioxx Prods. Liab. Litig.* Vioxx cases also were litigated in state courts in New Jersey, Texas and Florida.

[2] Interestingly, this decision involved an action wherein Mr. Benjamin, counsel for plaintiffs here, sought to vacate a settlement, alleging attorney wrong-doing --that the plaintiff's previous attorney had a conflict of interest and coerced him into entering the settlement. The federal court found no conflict and no fraud.

agreement which was a voluntary opt-in agreement for the more than 58,000 MDL and state Vioxx cases.[3] The federal and state courts required the cases to be registered by January 15, 2008 or they were subject to dismissal. Further, all claimants had to enroll for settlement by May 1, 2008 and submit a claims package by July 1, 2008.[4] Money was set aside for the settlement, and claims were evaluated for settlement dollars based upon points, which were determined by the plaintiff's age, injury, duration of usage of Vioxx, consistency of use, when the claimant used Vioxx, the claimant's general health and his medical history. Those who opted into the Vioxx settlement and also alleged that their injury arose from Celebrex and/or Bextra, had to relinquish their claims in the Bextra/Celebrex litigation. The HHR defendants jointly with the W&C defendants represented Merck in the Vioxx litigation.

This court issued Case Management Orders (CMOs) in the Bextra/Celebrex litigation. For the most part, the CMOs were coordinated with the MDL, reflecting agreements by the New York Coordinated Proceeding Plaintiffs' Steering Committee made with Pfizer. Among the CMOs issued were the following orders: (1) Actions were to be filed separately as to individual plaintiffs; (2) Each plaintiff was required to submit fact sheets with specifics as to the drugs ingested; (3) Violations of the CMOs or of discovery obligations could result in dismissal; and (4) Attorneys who were members of the Plaintiffs' Steering Committee were to discontinue with prejudice, within 45 days, subject to re-filing in the MDL within 60 days, all "blended cases",

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[3] The settlement agreement in the Vioxx litigation can be obtained at www.vioxx.laed.uscourts.gov.

[4] As of May 2008, of the approximately 20 cases tried, plaintiffs, after appeal, had won 3 victories.

that is, cases brought by the same plaintiff against both Merck and Pfizer for alleged injury arising from ingesting both Vioxx and Bextra/Celebrex.

Ronald R. Benjamin, counsel for plaintiffs Bates, Matias, Herbert (Peltz), Golub and Jaros, filed a single joint complaint in the Bextra/Celebrex litigation, in violation of the court's CMOs. Benjamin then dismissed the complaint and re-filed the cases individually. Moreover, these cases were blended cases. Regardless, Benjamin did not dismiss them and refile in the MDL, as required by the court's CMO 2. CMO 2 specifically provided that in the event plaintiffs' counsel failed to dismiss the blended cases as required, defendants' counsel could submit a proposed order of dismissal with prejudice. Either way, blended cases were to be dismissed with prejudice, with the option of re-filing in the MDL litigation. Not only was this by agreement of the Steering Committee but it also was impelled by the fact that the court was assigned to coordinate Bextra/Celebrex cases, not Vioxx cases, and by the difficulty of proving causation when a plaintiff had ingested Vioxx, Bextra and/or Celebrex.

The Complaint

The complaint alleges a "fraudulent scheme to cheat defendants out of their causes of action against Merck." Complaint, Prelim Statement. Specifically, the complaint generally alleges that each of the plaintiffs ingested both Celebrex and Vioxx and "sustained indivisible injury as a result." *Id.* at para. 15. It states that in late 2008 or early 2009, each plaintiff agreed to settle his/her claims against Pfizer. *Id.* at para. 17. Without alleging to whom, the complaint alleges "it was made clear" during negotiations that the plaintiffs were not relinquishing their claims against Merck due to their ingestion of Vioxx. *Id.* at para. 18. It then states, "[u]pon information and belief," the HHR defendants sought to include stipulations of dismissal as

against Merck even though they were expressly advised by Pfizer that Merck was not included in the settlement. *Id.* at para. 19. The complaint also alleges that "at a minimum, [each of the defendants] could not have reasonably believed that defendants had any intention of dismissing their claims against Merck." *Id.* at para. 20. It continues by contending that all the plaintiffs, save Martin, executed stipulations of partial dismissal with prejudice as against Pfizer, on January 30, 2009 and Martin executed such a stipulation on July 24, 2009. *Id.* at para. 21.

The complaint then asserts that HHR filed or caused to be filed stipulations of dismissal with prejudice, of the Bates and Golub claims against Merck on July 21, 2009 and the Matias, Jaros and Herbert claims on July 23, 2009. *Id.* at para. 22. The complaint alleges fraud and a scheme to defraud, which "upon information and belief involved the defendants engaging in conduct of altering the stipulations plaintiffs' counsel had actually signed." *Id.* at para. 24. Additionally, the complaint claims, again upon information and belief, that the alteration of the stipulations was intentionally done by switching the front page of each stipulation. *Id.* at para. 25. It states that on or prior to August 10, 2009, someone working for HHR or Ms. Hayes deliberately altered counsel's stipulation in the Martin case by switching the first page. *Id.* at para. 26. It further states that "upon information and belief" defendants Horn and Hayes participated in the alterations of the stipulations and in denying and concealing those alterations. *Id.* at para. 29. It claims millions of dollars in damages which could have been obtained from Merck at jury trial, had the cases not been dismissed. *Id.* at paras. 31, 33. In paragraphs 41 through 45, the complaint alleges specifics as to ingestion of Vioxx by all the plaintiffs, except Peltz (Herbert case), and the harm thereby caused them.

In support of its motion, the HHR defendants submit the affidavit of defendant Hayes to

which she annexes emails and documents attached to the email, which she received during this litigation. Among the emails is a July 17, 2009 email from Merck's counsel in which he references all of the plaintiffs' cases and says he is awaiting "dismissals from Merck" in those cases; the subject line of the email is "Ron Benjamin (plaintiffs' counsel) dismissals." Exhib. A. In answer, on July 20, Ms. Hayes responds that she received no stipulations in the cases and, among other things, asks if they are Benjamin's cases (counsel herein). Exhib B. On July 21, 2009, counsel for Merck answers her response and, *inter alia*, states: "These dismissals are for cases that are part of the Pfizer settlement with Ronald Benjamin"; He would prepare a new stipulation in Martin and have Mr. Benjamin sign before forwarding it to Ms. Hayes; and the dismissals in the Peltz (Herbert) case were attached for her execution. Exhib. C. Attached also are stipulations of dismissal as to both Pfizer and Merck in Peltz, Matias, Jaros, Golub and Lupole (Martin), all signed by Benjamin on the second page, as well as two similar stipulations in unrelated cases, also signed by Benjamin. That same day, Ms. Hayes responds with an email and PDFs of the stipulations with her signature. Exhibs. D, E.

Additionally submitted by HHR is an affirmation of Matthew Holian, a partner at DLA Piper LLP (US), Pfizer's counsel, attesting to the emails' validity. He was copied on the emails. Moreover, he annexes a January 30, 2009 letter from Mr. Benjamin to DLA Piper, with stipulations of dismissal of plaintiffs' and other's annexed, all of which dismiss claims against both Pfizer and Merck.

In opposition to the motions, plaintiffs supplement their complaint with an Affirmation of Ronald R. Benjamin; an Affidavit of Diane Walter, a paralegal in Benjamin's office; and an Affirmation of Marya C. Young, an attorney in Benjamin's office. In brief, Benjamin avers that

he sent Pfizer-only stipulations to HHR and that he agreed to add a signature line for Merck but not to dismiss them. Walters avers that the only stipulations she prepared were Pfizer-only, and that she "did not prepare, nor does [their] computer contain, any documents ... that contain the language that appears on the first page of the stipulations defendants attach to their moving papers.... Mr. Benjamin did not sign stipulations that were not prepared in our office.... I dispute that exhibit A to Mr. Holian's affirmation attaches the correct stipulations." Walters Affirm. ¶¶8-9. She explains that further discovery is necessary because she is "certain" that the stipulations submitted by defendants are not the ones she prepared or Benjamin signed.

Discussion

On a motion to dismiss pursuant to CPLR 3211, the court must accept the facts as alleged in the complaint as true, accord plaintiff the benefit of every possible favorable inference and determine only whether the facts as alleged fit within any cognizable legal theory. *Morone v Morone*, 50 NY2d 481, 484 (1980); *Rovello v Orofino Realty Co.*, 40 NY2d 633, 634 (1976). CPLR 3026 mandates that "[p]leadings shall be liberally construed. Defects shall be ignored if a substantial right of a party is not prejudiced.." In assessing a motion under CPLR 3211, however, a court may freely consider affidavits submitted by the plaintiff to remedy any defects in the complaint. *Rovello v Orofino Realty Co., supra,* at 635. Ultimately, "the criterion is whether the proponent of the pleading has a cause of action, not whether he has stated one." *Id.* at 636. Nonetheless, under CPLR 3211(a)(7), a complaint must be dismissed if it fails to state a cause of action. "Factual allegations that do not state a viable cause of action, that consist of bare legal conclusions, or that are inherently incredible or clearly contradicted by documentary evidence are not entitled to such consideration." *Skillgames, L.L.C. v Brody*, 1 AD3d at 250.

CPLR 5015

Defendants argue that plaintiffs are precluded from collaterally attacking the stipulations by alleging fraud in a plenary action, contending that their only means of complaint is through a motion to vacate brought under CPLR 5015. That remedy, however, is not available to plaintiffs because the court no longer has jurisdiction over the matters that have been discontinued with prejudice on stipulation. *See In re Creamer's Estate*, 37 AD2d 33 (1st Dept 1971) (finding lower court without jurisdiction to enforce stipulation of settlement and that plenary action was necessary); *Citibank v Rehn*, 20 Misc3d 139(A) (App Term 2d Dept 2008).

CPLR 3211(a)(7)

Fraud must be pled with particularity. CPLR 3016(b); *see Pope v Sager*, 29 AD3d 437, 441(1st Dept 2006). "When a plaintiff brings a cause of action based upon fraud, 'the circumstances constituting the wrong shall be stated in detail.'" *Sargiss v Magarelli*, 12 NY2d 527, 530 (2009). The complaint, therefore, must allege facts establishing the elements of fraud in sufficient detail to permit a reasonable inference of the alleged conduct. *Id.* at 531. Fraud requires proof of misrepresentation or a material omission of fact, knowledge by the party who made the misrepresentation that it was false when made, justifiable reliance by the plaintiff and resulting injury. *Lama Holding Co. v Smith Barney*, 88 NY2d 413, 421 (1996). The complaint here, even supplemented by affidavits, fails in this burden.

The instant complaint is replete with surmise and conclusory statements. Most of the allegations in the complaint are asserted upon information and belief. Thus, the complaint speculates, "upon information and belief," that: defendants altered plaintiffs' stipulations of dismissal; the alterations were carried out by intentionally switching the first pages of the

stipulations; Ms. Hayes or someone at HHR deliberately switched the first pages; and Ms. Hayes and Ms. Horn participated in altering the stipulations. Merck is not specifically accused of any misdeed. The complaint, then, conjectures that the plaintiffs would have reaped millions had they settled only against Pfizer and tried their cases against Merck. The complaint is but a theoretical hypothesis, devoid of any fact. It is devoid of facts establishing that defendants made material misrepresentations or omissions that they knew to be false so as to induce reliance by plaintiffs, or that plaintiffs so relied to their injury.

Indeed, in opposition, the HHR defendants have submitted emails and annexed documents which demonstrate the opposite. The documents submitted demonstrate that Ms. Hayes first learned of the stipulations from Pfizer's counsel, who informed her that the stipulations dismissed Merck, as well as Pfizer, from Mr. Benjamin's cases. Plaintiffs' stipulations are sent and included with stipulations of other Pfizer/Merck plaintiffs represented by Mr. Benjamin, all of which stipulations dismiss both Pfizer and Merck and all of which are signed by Mr. Benjamin. These stipulations are sent from Pfizer's counsel and neither originate with the HHR defendants nor the W&C defendants.

The affidavits submitted by plaintiffs do not change the complaint from hypothesis to fact. Moreover, Ms. Walters merely avers to what she did or knew. Mr. Benjamin avoids making a statement regarding the stipulations he sent to Pfizer's attorney by speaking to what he sent to HHR. However, the documents submitted speak to what was sent to HHR from Pfizer's counsel. The motions to dismiss, thus, are granted.

Moreover, the cases that were dismissed with prejudice as to Merck were blended cases

that the court's CMO 2 required to be dismissed as to both Merck and Pfizer. CMO 2 also allowed defendants' counsel to submit proposed orders of dismissal where plaintiffs' counsel failed to dismiss the cases as required. The stipulations that were filed dismissing the cases as to Merck were in keeping with the agreement reflected in CMO 2.[5] Accordingly, it is

ORDERED that the defendants' motions to dismiss the complaint are granted and the complaint is dismissed in its entirety as against all defendants, with costs and disbursements to said defendants as taxed by the Clerk of the Court, and the Clerk is directed to enter judgment accordingly in favor of all of the defendants and against the plaintiffs.

ENTER,

Date: November 10, 2010
New York, N. Y.

J.S.C.

[5] There is nothing to demonstrate that plaintiffs filed their claims against Merck in any action other than the blended cases before this court. In any event, it is clear that plaintiffs could not settle their Merck claims, having settled the Pfizer claims.